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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FLETCHER HARTWELL HYLER and SHERYL ROOT HYLER,

Plaintiffs,

vs.

INVESTMENT GRADE LOANS, INC., et al.

Defendants.

/

CASE NO.: 07-CV-03180 WHA

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO SET ASIDE JUDGMENT AND SETTLEMENT AGREEMENT

Hearing Date: August 28, 2008
Time: 8:00 a.m.
Courtroom: 9
Judge: Hon. William H. Alsup

Defendants INVESTMENT GRADE LOANS, INC., LINCOLN TRUST COMPANY FBO, DOUG PICKERING, IRA, CHERN S. LIN, FELICIA LIN, JANICE TEMPEY, ROY S.WOLF, THOMAS C. O'CONNELL, JR., JANICE K. O'GRADY, PENSCO TRUST COMPANY AS CUSTODIAN FBO JOHN A. SNYDER IRA, PENSCO TRUST COMPANY AS CUSTODIAN FBO PHIL AHLFELDT, IRA, AND JOHN STEVENS (hereinafter collectively referred to as "IGL" or "Defendants") submit the following points and authorities in opposition to the Hylers' Motion To Set Aside Judgment And Settlement Agreement:

I. INTRODUCTION

In a brief to an appellate court (where the Hylers appealed the Unlawful Detainer Judgment that their attorney stipulated to in court), the Defendants herein submitted that the real issue in that appeal was "how many bites of the same apple does one guy get?" Yet, here he goes

again, and this time he is really grasping at straws. In an effort to have this court set aside its Sept. 6, 2007 Order Dismissing Action as well as their Compromise And Settlement Agreement of August 21, 2007, they ask this court to:

1) believe that they relied on "the apparent fact that the Defendants themselves believed they had made the subject loan for business purposes" (quoted from paragraph 20 of Mr. Hyler's declaration);

2) make a finding that the Defendants did not have a such a belief, based on the plea bargain agreement Andrew Lewis made with the California Department of Real Estate;

3) ignore the express language of their settlement agreement, including the "known and unknown" facts and claims;

4) ignore the fact that California Government Code §11415.60 specifically provides that in an administrative hearing decided by settlement "no evidence of an offer of compromise or settlement made in settlement negotiations is admissible in an adjudicative proceeding or civil action, whether as affirmative evidence, by way of impeachment, or for any other purpose";

5) overlook the fact that in January of 2008, the Hylers novated the agreement they now seek to set aside, thereby waiving any rescission claim; and

6) forget that no where in their moving papers have the Hylers offered or tendered to Defendants everything they paid out in reliance on the Compromise And Settlement (over six million dollars in paying off the senior encumbrance, the property taxes, and the property insurance, all of which were substantially in default by the Hylers), such a tender being a legal pre-requisite to any rescission.

IGL submits that the Motion is so lacking in merit as to be found "frivolous" such that IGL should be awarded and hereby requests, its attorney's and costs incurred in opposing the motion, as a sanction per Federal Rule of Civil Procedure 11.

II. **LEGAL ARGUMENT**

A. Plaintiffs Purported Reliance On Defendants' Belief

The alleged "fraud" upon which Plaintiffs' motion is based is that Defendants did not

believe or have the understanding that the subject loan was made to the Hylers for "business purposes"; and, the Hylers argue, had they known this "fact", they "would not have executed the Settlement Agreement or stipulated to the Order Dismissing Action" (Plaintiffs' Motion, page 14, lines 17 through 19).

Defendants submit that not only did they actually believe or have the understanding that the loan was made for "business purposes" (see Declaration of Andrew A. Lewis submitted herewith), but they did not have a duty to disclose the alleged "fact" to Plaintiffs nor were Plaintiffs induced to enter the Settlement by any belief or understanding of Defendants.

As the Settlement Agreement itself states (attached as Exhibit "F" to the Hyler Declaration In Support Of Plaintiffs' Motion), the Hylers "contest the validity of the foreclosure, the right of IGL to institute eviction proceedings and all other rights IGL has contended that it has in the property and/or against Hyler", but "to resolve all their disputes and agree upon a settlement of any and all matters in dispute amongst them", they "extinguish their mutual rights and claims arising from any and all disputes and differences between them and that each has or may have against each other, in any way relating to their Dispute and the Action". They then released Defendants (and Defendants released them) "from any and all rights, claims, demands, damages, debts, liabilities, accounts, reckonings, obligations, costs, expenses, liens, actions, and causes of action of every kind and nature whatsoever, whether known or unknown, suspected or unsuspected", etc. (paragraph 1 of Exhibit "F", the Settlement Agreement). Moreover, the consideration for the dismissal of the Action, per paragraph 3, was expressly made to be the 60 day option given to the Hylers (from August 21, 2007) to repurchase the property. They got what they bargained for, the option, and as they acknowledge in their Motion, they did not exercise it.

In United States ex rel. Dianne Giles v. Lyle Sardie et al. (Cent. Dist. of Calif., 2000) 191 F. Supp.2d 1128, a party to a suit sought to invalidate his settlement agreement and release of claims on much of the same basis as the Hylers herein (a claim of "fraud" and an uncommunicated subjective intention). And the Court gave two basis for denying the attempt, both of which apply to the Hylers' motion: first, "a party seeking rescission based on fraudulent

nondisclosure must show: (1) the defendant failed to disclose a material fact which he knew or believed to be true, and (2) the defendant had a duty to disclose that fact" (IBID at 1132), and secondly, a party is not allowed to offer parol evidence as to his uncommunicated subjective intention when the written terms of the agreement are clear.

Applying those to the Motion at hand, the Hylers have not met their burden of showing that Defendants had a duty to disclose to Plaintiffs that Andrew Lewis (the individual who entered into the D.R.E. Stipulation) had a belief that the loan was not a business purpose loan; nor can the Hylers' uncommunicated subjective intention (to not dismiss the case in consideration for the 60 day option, should they learn that Mr. Lewis held a different belief or understanding) be used to avoid the clear written terms of the Settlement Agreement. As in the Giles case, the attempt to set aside the clear and unambiguous agreement should be denied.

B. Plaintiffs Cannot Meet Their Burden Of Proof That Defendants Did Not Have a Belief Or Understanding That The Loan Was For Buying Business Purposes

Even if Plaintiffs could have used the Stipulation of Andrew Lewis in the D.R.E. proceeding (discussed further below), it does not constitute evidence of what Defendants believed or did not believe as to the purpose of the loan to Hylers. No where in the Stipulation does Mr. Lewis, never mind any of these Defendants, state that their original understanding or belief was that the loan was intended for personal, not business, purposes. Even the D.R.E. Accusation does not state that; only that it is a "covered loan" under the Financial Code because it (1) was secured by a owner occupied principal dwelling; (2) the principal balance of the loan was under $250,000; (3) the interest rate exceeded the Treasury rate plus 8%; and (4) the total points and fees exceed 6% of the loan amount (see paragraph XXV of the Accusation, attached as Exhibit "H" to Plaintiffs' Motion).

To get to where they want to be from that Stipulation, the Plaintiffs backhandly argue that the loan which was the subject of the D.R.E. proceeding (the $100,000 loan) was "made pursuant to the same application" as the loan that is the subject of this TILA case (page 13, lines 25 & 26 of Motion) and that the stipulation was an admission by Mr. Lewis that the loan "was a consumer

loan rather than business loan"(page 14, lines 1 and 2 of Motion). And neither is correct. There is no evidence to support the "same application" argument (obviously because the only "application" was the one submitted to IGL by the Hylers' agent, Gary Bowers, described in Exhibit "D", Defendants' Memorandum In Opposition To Request For Preliminary Injunction, at page 5, lines 2-6, showing that the loan was requested as a business purpose loan). Moreover, as Mr. Lewis makes clear in his Declaration submitted herewith, he entered the Stipulation not as an admission of anything, but merely as an acceptance of the plea bargain offered by the D.R.E. (who opined that Mr. Hyler was not a "victim of predatory lending" but more of a "predatory borrower"). Mr. Lewis confirms in no uncertain terms that it was, is, and always has been his belief and understanding that the loan was made for business purposes.

C. The Express Language Of The Hylers Settlement Agreement Is Unambiguous And Bars The Hylers' Attempt

The Settlement Agreement that the Hylers now seek to avoid, despite having already reaped the benefits (an option to repurchase or reinstate, and continued possession during the interim) contained a California Civil Code §1542 waiver (extending it to claims that a party does not know or suspect to exist in his favor at the time of executing the release, which if known to him must have materially affected his decision to settle). It also contained a provision that no oral representations shall be of any force or effect unless contained in the written agreement or a written modification signed by all parties.

No where does the Agreement state that the Hylers entered it on the belief that Defendants believed their loan to be a business purpose loan; nor that this was a material representation made to them that they relied on in entering the Settlement.

In Winet v. Price (1992), 4 CalApp 4th 1159, where a party to a settlement and release agreement tried to get out of it based on his subjective intent (and the language was similar, if not identical, to the agreement at hand), the Court held that evidence of an undisclosed intent is irrelevant to determining the meaning of contractual language. The Court went on to hold that the Plaintiff expressly assumed the risk of unknown claims or facts; was represented by counsel

(relying on counsel's advice, not the uncommunicated intention); and was estopped from claiming the agreement to be contrary to his unexpressed intentions or understanding. And Mr. Hyler, like the Plaintiff in the Winet case, was not "an unsophisticated claimant who is presented with a form release on a "take it or leave it basis" and signs the release without the benefit of counsel, conferring a windfall on an insurance company. To the contrary, Winet [Hyler] appears to be a sophisticated businessman who, with the benefit of counsel, specifically negotiated the subject release in an arms-length transaction." (IBID at 1170)

D. The Agreement Between The Department Of Real Estate And Andrew Lewis Cannot Be Used Herein As Evidence Of Anything

California Government Code §11415.60, pertaining to administrative proceedings such as the D.R.E. Accusation involving Andrew Lewis, provides in full as follows:

> (a) An agency may formulate and issue a decision by settlement, pursuant to an agreement of the parties, without conducting an adjudicative proceeding. Subject to subdivision (c), the settlement may be on any terms the parties determine are appropriate. Notwithstanding any other provision of law, no evidence of an offer of compromise or settlement made in settlement negotiations is admissible in an adjudicative proceeding or civil action, whether as affirmative evidence, by way of impeachment, or for any other purpose, and no evidence of conduct or statements made in settlement negotiations is admissible to prove liability for any loss or damage except to the extent provided in Section 1152 of the Evidence Code. Nothing in this subdivision makes inadmissible any public document created by a public agency.
>
> (b) A settlement may be made before or after issuance of an agency pleading, except that in an adjudicative proceeding to determine whether an occupational license should be revoked, suspended, limited, or conditioned, a settlement may not be made before issuance of the agency pleading. A settlement may be made before, during, or after the hearing.
>
> (c) A settlement is subject to any necessary agency approval. An agency head may delegate the power to approve a settlement. The terms of a settlement may not be contrary to statute or regulation, except that the settlement may include sanctions the agency would otherwise lack power to impose.

Section 1152 of the California Evidence Code provides as follows:

> (a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements

> made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it.
>
> (b) In the event that evidence of an offer to compromise is admitted in an action for breach of the covenant of good faith and fair dealing or violation of subdivision (h) of Section 790.03 of the Insurance Code, then at the request of the party against whom the evidence is admitted, or at the request of the party who made the offer to compromise that was admitted, evidence relating to any other offer or counteroffer to compromise the same or substantially the same claimed loss or damage shall also be admissible for the same purpose as the initial evidence regarding settlement. Other than as may be admitted in an action for breach of the covenant of good faith and fair dealing or violation of subdivision (h) of Section 790.03 of the Insurance Code, evidence of settlement offers shall not be admitted in a motion for a new trial, in any proceeding involving an additur or remittitur, or on appeal.
>
> (c) This section does not affect the admissibility of evidence of any of the following:
>
> (1) Partial satisfaction of an asserted claim or demand without questioning its validity when such evidence is offered to prove the validity of the claim.
>
> (2) A debtor's payment or promise to pay all or a part of his or her preexisting debt when such evidence is offered to prove the creation of a new duty on his or her part or a revival of his or her preexisting duty.

The obvious policy of both statutory provisions, relating to inadmissability of compromise offers and settlement agreements, is to avoid deterring parties from trying to settle disputes and to facilitate candid discussions and encourage settlements, which might well be discouraged if a party knew that they might later be used to prove the invalidity of some other claim which he may wish to assert. Fieldson Associates, Inc. v. Whitecliff Laboratories (1969) 276 Cal.App.2d 770.

Whether or not the Hylers were aware of the Stipulation And Agreement entered by Mr. Lewis with the D.R.E., when they settled the within case, is irrelevant both now and at the time of execution. That settlement agreement was and is statutorily inadmissable and unusable as evidence of anything in this TILA case.

E. Assuming, Arguendo, That The Hylers Had Any Rescission Rights, They Waived Them As To The August 2007 Agreement When They Entered Into The Subsequent January, 2008 Agreement

As part of the basis for their motion to set aside their settlement agreement and the dismissal entered pursuant to it, Plaintiffs do not state when they learned of Mr. Lewis' D.R.E. agreement, but only that "Plaintiffs discovered Mr. Andrews' [SIC] admission substantially after executing the Settlement Agreement." (page 14 of Motion, lines 15 and 16). They also do not disclose to this Court that they subsequently novated that Settlement Agreement with yet another written agreement with IGL. That subsequent agreement was entered into on January 28, 2008 and is attached to the Declaration of Andrew A. Lewis submitted herewith.

It has long been a rule in California that a right to rescind a contact is waived if the contract is affirmed with knowledge of the circumstances that may give rise to a rescission. Neet v. Holmes (1944) 25 Cal.2d 447. It is submitted that when the Hylers entered the January 28, 2008 agreement, wherein they reaffirmed their agreement to pay the remaining $1.9 million unpaid under the August 2007 Settlement Agreement (in consideration for an extension of their option to repurchase under the Settlement Agreement and further continued possession in the interim) they waived any right they had to rescind the 2007 Settlement Agreement. And if they are now going to contend that they did not learn of the D.R.E. Stipulation until after the January 2008 agreement, then they still have a twofold problem: one, prove a reasonable excuse as to why they did not discover the D.R.E. Stipulation earlier, since they were the original complaining party to the D.R.E.; and two, prove that they are also entitled to rescind the January 2008 agreement, since it novated and replaced the earlier August 2007 Agreement. Their moving papers certainly do neither.

F. No Where In Plaintiffs' Moving Papers Do They Offer To Restore To Defendants All Sums Expended By Defendants In Reliance On The Settlement Agreement

As Plaintiffs are well aware, when Defendants foreclosed on the subject property and Plaintiffs failed to perform on any of their post-foreclosure agreements, the property was subject to a senior encumbrance of approximately $5.5 million, and which was in default. In the January 2008 agreement (attached to the Andrew A. Lewis Declaration as an exhibit) both the amount and the pending foreclosure sale date are expressly mentioned. And as Plaintiffs are further aware, Defendants were compelled to pay off that loan to prevent being foreclosed out themselves, as well as to cure all property tax defaults and pay for fire insurance.

Per California Civil Code §1691, a party seeking to rescind an agreement must not only give notice of rescission to the party as to whom he rescinds, but also restore to the other party everything of value received under the agreement. In the case at hand, Plaintiffs would have to not only offer to restore Defendants' undisputed principal amount of the subject loan, but also all the monies paid by Defendants on the property after the Settlement Agreement. Yet, as the Court will note, no where in their Motion papers do they offer to restore anything to Defendants.

In fact, as the Court will recall, the reason that Defendants were allowed to go ahead with their foreclosure after Plaintiffs' motion for a preliminary injunction was because twice Plaintiffs failed to come up with even the $835,000 that they conceded was due to Defendants: once, following a stipulation entered in court before the August 1, 2007 injunction hearing, and the second time following the Court's conditional grant of the injunction if they posted said amount in either cash or a bond by August 15, 2007. The Settlement Agreement, of which they now seek relief , was only entered after that foreclosure, to give the Plaintiffs yet another 60 days, plus another four months in a series of further agreements reached after the August 2007 Agreement (one in the Unlawful Detainer action, put on the record at time of trial; another in an

agreement to dely execution of a post-judgment writ of possession; and finally the January 28, 2008 agreement provided herewith). Not once did they fully perform their end of the agreement, eventually costing Defendants millions of dollars to save their investment. And now here the Plaintiffs are again, seeking more delays and time without offering payment of even the amounts they would be required to pay even if they prevailed on all issues under the TILA case.

G. SANCTIONS

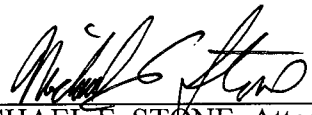
For all the reasons given above, any one of which defeats Plaintiffs' motion, this Court is respectfully requested to not only deny the motion, but find that it is so lacking in merit that it is frivolous. The Court is then requested to either sanction the Plaintiffs by awarding Defendants the reasonable attorney's fees and expenses incurred in defending against it, or order Plaintiffs to show cause why their making of their Motion has not violated Federal Rule 11 (b) such that sanctions should be imposed [per Federal Rule 11 (c) (3)].

III. CONCLUSION

As a matter of law, Plaintiffs' Motion To Set Aside Judgment And Settlement Agreement should be denied. No evidentiary hearing on the motion is necessary or warranted. And if the Court is disinclined to award sanctions at the time of its denial of Plaintiffs' motion , then Defendants respectfully suggest that it should order Plaintiffs to show cause why they should not be sanctioned for filing a frivolous motion and be ordered to pay Defendants' attorney's fees and costs.

Dated: July 29, 2008

Respectfully submitted,
LAW OFFICES OF MICHAEL E. STONE



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